Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, and MICHAEL ANTONOVICH,

Petitioners,

v.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the individual members of the Los Angeles County Board of Supervisors are entitled to *absolute* immunity from liability under 42 U.S.C. § 1983 for their legislative actions implicating public policy issues in voting to expend monies from the County budget to indemnify individual Sheriff's deputies for punitive damage awards pursuant to state law?

2. Whether, in an action brought under § 1983, an inquiry into the subjective intent (i.e., good or bad faith) of the members of the Los Angeles County Board of Supervisors in voting to indemnify Sheriff's deputies for punitive damages is permissible under this Court's precedent for purposes of assessing *qualified* immunity?

LIST OF INTERESTED PARTIES

Petitioners herein Michael Antonovich, Yvonne Burke, Donald Knabe, Gloria Molina and Zev Yaroslavsky are the five elected members of the Los Angeles County Board of Supervisors, the legislative body of the County of Los Angeles. They are sued in their official and individual capacities and were appellants in the Court of Appeals.

Respondent herein Javier Rocha is the plaintiff in the district court and was the appellee in the Court of Appeals.

The County of Los Angeles and Leroy Baca are defendants in the district court and were appellants in the Court of Appeals. They are not parties to this petition.

Defendants Pete Schabarum and Deane Dana were dismissed by the district court on September 14, 2000 for failure to prosecute. They were not parties before the Court of Appeals and are not parties to this petition.

Defendant Deputy David Sameyah was not a party before the Court of Appeals and is not a party to this petition.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is an unpublished decision reported at 2002 WL 1008617 (9th Cir. 2002). App. at 1. That decision affirmed the United States District Court for the Central District of California's order denying the Petitioners' Motion to Dismiss. The district court's order is reported in *Rocha v. Baca*, 2000 WL 1909474 (C.D.Cal. 2000). App. at 2-18.

JURISDICTION

The district court denied Petitioners' Motion to Dismiss on November 14, 2000. App. at 2-18. Petitioners filed a timely Notice of Appeal on November 22, 2000. The Court of Appeals for the Ninth Circuit summarily affirmed the district court's ruling on May 15, 2002. App. at 1. Petitioners timely filed this petition. Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1983 provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

> proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

Section 825(b) of the California Government Code provides, in pertinent part, that:

> ". . . a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of state government, finds all of the following:
>
> (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
>
> (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
>
> (3) Payment of the claim or judgment would be in the best interests of the public entity.

NATURE OF THE CASE AND PROCEDURAL HISTORY

I. Introduction

A. Absolute Immunity

The Circuit Courts of Appeals are split concerning the proper test to apply when a legislator seeks absolute

immunity from civil liability under 42 U.S.C. § 1983. In determining whether the action at issue is legislative (and therefore absolutely immune) or administrative (and therefore not afforded absolute immunity), the Ninth Circuit continues to apply the wrong standard. Under the Ninth Circuit's test, if the legislator's action applies only to a few individuals, rather than to society at large, the legislator is not entitled to absolute immunity. The problem with the "individual versus society" test is that it is contrary to this Court's precedent and defeats the very purpose of absolute immunity, which is to protect legislators from having to litigate over their legislative acts.

The appropriate test is to examine the legislative action at issue, in this case casting votes on matters of public policy (i.e., the "best interests of the public entity") and to ask whether that action is legislative in function. If it is, the legislators are absolutely immune from liability. The smooth running of local government requires that this immunity be applied so that elected legislators are not inhibited in their duties for fear of being sued and are not distracted from their official functions. The system provides its own checks and balances on legislators' actions by way of the ballot box or removal from office if they exceed their powers.

The Ninth Circuit continues to employ the "individual versus society" test even though it was rejected by this Court in *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998) (mayor and city councilmembers entitled to absolute immunity for voting for a fiscal matter because such action is integral to the legislative process). *See Trevino v. Gates*, 23 F.3d 1480, 1483 (9th Cir. 1994) (*"Trevino I"*) (applying the "individual versus society" test in 1994, before *Bogan*); *San Pedro Hotel Co. Inc. v. City of Los Angeles*, 159 F.3d 470, 476

(9th Cir. 1998) (recognizing *Bogan* but nevertheless, eight months after *Bogan*, still utilizing the "individual versus society" test for determining absolute immunity).

In separate lawsuits brought by plaintiff's counsel herein, these specific legislator defendants have been sued personally at least sixteen times on exactly the basis that is at issue here. Without intervention from this Court, the Ninth Circuit will continue to permit such litigation, including discovery, despite this Court's rulings to the contrary and despite the prohibition of absolute immunity.

B. Qualified Immunity

The Ninth Circuit's ruling below also improperly transforms the qualified immunity analysis from a purely objective inquiry into one in which the *subjective intention* of each legislator is at issue. This Court repeatedly has held, however, that the only permissible inquiry in determining qualified immunity is an *objective* one. This Court has emphasized further the importance of ruling on the issue of qualified immunity at the earliest opportunity.

The Ninth Circuit has disregarded this precedent, however, by subjecting legislators to litigation – and discovery – as to whether they acted in "good faith." The requested writ is needed to protect legislators individually – in their personal capacities – so they can perform their legislative functions without having to respond to discovery and defend themselves in litigation that impermissibly inquires into their subjective intentions and motivations in legislating fiscal and public policy.

II. California Government Code section 825(b).

Pursuant to California Government Code section 825(b), the Petitioners are authorized to indemnify a county employee against a punitive damage award upon determining, "in [their] sole discretion," ~~that (i)~~ the employee was acting within the course and scope of his or her duties; (ii) the employee was acting in good faith and in what he or she perceived to be the County of Los Angeles' best interest; and (iii) payment of the punitive damages would be in the County's best interest.

In 1994, in *Trevino I*, the Ninth Circuit first considered the applicability of absolute immunity with respect to votes by municipal legislators to indemnify for punitive damages pursuant to section 825(b). There, the court held that absolute legislative immunity does not apply because such votes are "individually, not generally directed." *Trevino I*, 23 F.3d at 1483.

In 1996 in another case arising from the *Trevino* litigation, the Ninth Circuit considered the application of qualified immunity to a claim of liability based upon votes to indemnify for punitive damages. *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996) ("*Trevino II*"). In *Trevino II*, the Court found that qualified immunity applied because "the law was *not sufficiently clear* that a reasonable [public official] would understand that payment of punitive damages violates any constitutional right *either now or prior to the [incident in question].*" *Id.* at 917 (emphasis added).

In 2000, the Ninth Circuit decided another case regarding the application of qualified immunity to a claim based upon votes to indemnify for punitive damages. *Cunningham v. Gates*, 229 F.3d 1271, 1293 (9th Cir. 2000).

After recognizing that the law in the area was not clearly established until *Trevino II*, the *Cunningham* court observed that "[a]s a matter of chronological necessity," votes to indemnify punitive damage awards before *Trevino II* were automatically protected by qualified immunity. *Id.* at 1293. The Ninth Circuit held that votes which took place between *Trevino II* and the incident in question would be protected by qualified immunity as long as they were made in "good faith." *Id.* at 1293. The court concluded that the plaintiff failed to meet his burden of establishing that the votes were in "bad faith." *Id.* at 1293.

In 2001, the Ninth Circuit addressed the issue of qualified immunity in the context of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Navarro v. Block*, 250 F.3d 729, 734 (9th Cir. 2001). After reviewing *Trevino I*, *Trevino II* and *Cunningham*, the Ninth Circuit in *Navarro* reaffirmed that "local legislators are not entitled to qualified immunity if they implement their state-created power to indemnify police officers from punitive damage awards in bad faith." *Id.* at 734. The *Navarro* Court further stated that a § 1983 plaintiff is entitled to conduct discovery to determine whether punitive damage votes are made in "good faith." *Id.* at 734.

Besides the instant case, plaintiff's counsel has filed at least 29 other cases against local legislators (city and county) based upon this exact same claim.[1] While most of

[1] Petitioners and others have been sued in numerous cases which involved extensive discovery including multiple sets of interrogatories, notices of deposition, document requests, and motion practice regarding

(Continued on following page)

these cases ultimately have been dismissed, it has not been without substantial expense, delay, discovery and distraction from the performance of public duties.

For example, in *Moore v. Baca*, C.D. Cal. Case No. 01-CV-03552 FMC, the Petitioners moved in their individual capacities for summary judgment based on qualified and

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such discovery. *See Casares v. Baca*, 99-CV-07817 (Petitioners dismissed on February 25, 2002 on basis of qualified immunity); *King v. Baca*, 00-CV-11178 (Petitioners dismissed on February 4, 2002 on basis of qualified immunity); *Moore v. Baca*, 01-CV-03552 (Petitioners dismissed on May 21, 2002 on basis of qualified immunity); *Moreno v. Baca*, 00-CV-07149 (Petitioners dismissed on March 18, 2002 on basis of qualified immunity); *Bell v. Baca*, 01-CV-02067 (Petitioners dismissed on February 26, 2002); *Berry v. Baca*, 01-CV-02069 (Petitioners dismissed on February 26, 2002); *Hart v. Baca*, 01-CV-01866 (Petitioners dismissed on February 26, 2002); *Mortimer v. Baca*, 00-CV-13002 (Petitioners dismissed on February 26, 2002); *Hawkins v. Baca*, 00-CV-01078 (settled October of 2001); *R. Navarro v. Baca*, 98-CV-7434 (settled September of 2001); *L. Navarro v. Baca*, 99-CV-08888 (settled September of 2001); *Benas v. Baca*, 00-CV-11507 (currently pending); *Chweya v. Baca*, 00-CV-07150 (currently pending); *Thomas v. Baca*, 01-CV-10903 (Petitioners have yet to be served); *Green v. Baca*, 02-CV-04744 (Petitioners have yet to be served); and *Harris v. Baca*, 01-CV-10905 (Petitioners have yet to be served). Additionally, the members of the Los Angeles City Council have been sued under this theory of liability in several cases as well. *See Figueroa v. Gates*, 00-CV-4158 (City Councilmembers dismissed on June 11, 2002 on basis of qualified immunity); *Hernandez v. Gates*, 99-CV-11696 (City Councilmembers dismissed on June 20, 2000 on basis of qualified immunity); *Minster v. Gates*, 01-CV-01867 (case dismissed in its entirety June 28, 2002); *Lee v. Gates*, 01-CV-03085 (case dismissed in its entirety June 28, 2002); *Walker v. Gates*, 01-CV-10904 (currently pending); *Blumberg v. Gates*, 00-CV-5607 (currently pending); *Rivas v. Gates*, 00-07207 (currently pending); *Quintana v. Gates*, 00-CV-07167 (currently pending); *Rodriguez v. Gates*, 00-CV-07427 (currently pending); *Guerrero v. Gates*, 00-CV-07165 (currently pending); *Moss v. Gates*, 00-CV-07164 (currently pending); *Bell v. Gates*, 01-CV-01863 (currently pending); and *Berry v. Gates*, 01-CV-2066 (currently pending).

absolute immunity on August 20, 2001. Plaintiffs obtained two Rule 56(f) continuances to conduct more discovery. It was not until May 21, 2002 – nine months later – that the Petitioners were dismissed. *Moore v. Baca*, 2002 WL 1040997, *3-*4 (C.D.Cal. 2002). During that time, they were served with five sets of interrogatories, five sets of document requests, and at least three discovery motions; and their depositions were sought and avoided only after obtaining a protective order.

III. The Underlying Claims.

This petition for *writ of certiorari* arises from the allegations of Respondent/Plaintiff Javier Rocha that on March 17, 1999, Los Angeles County Sheriff's Deputy David Sameyah used excessive force during a search at a Los Angeles County jail facility. App. at 25. The Respondent seeks to impose personal liability pursuant to 42 U.S.C. section 1983 against Petitioners/Defendants Michael Antonovich, Yvonne Burke, Donald Knabe, Gloria Molina and Zev Yaroslavsky, who comprise the elected legislative body of Los Angeles County, namely its Board of Supervisors. App. at 22. The Respondent's theory is that because these individuals previously voted to indemnify other Sheriff's deputies for punitive damages pursuant to California Government Code section 825(b), the Petitioners encouraged the Sheriff's deputy herein to use excessive force against the Respondent, thereby causing the deprivation of his constitutional rights. App. at 24.

When the Respondent first filed this suit against the Petitioners, they moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds of absolute

and qualified immunity. App. at 2-3. On November 14, 2000, the District Court denied absolute immunity on the basis of *Trevino I* and denied qualified immunity pending further discovery, holding that "if plaintiff fails to come up with evidence of bad faith . . . on the part of the supervisors, that will be sufficient to entitle [the supervisors] to summary judgment." App. at 14. The Petitioners appealed that decision. On May 15, 2002, the Ninth Circuit summarily affirmed the district court's ruling in this case, relying on *Navarro*. App. at 1.[2]

IV. The Ninth Circuit's Affirmance Conflicts With This Court's Precedent.

This petition concerns the important concepts of absolute and qualified immunity for elected legislators. The policy reasons behind these doctrines, which are not defenses but *immunities from suit*, are to protect public officials, and society as a whole, from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727 (1982). *See Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034 (1987) ("permitting damages suits against governmental officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

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[2] On June 12, 2002, after a bifurcated trial of the underlying claim, a jury concluded that the Deputy, in fact, used excessive force. This finding does not affect the argument or analysis herein.

These immunity doctrines are also designed to protect public officials from the burdens of pre-trial litigation and discovery, burdens which are "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. Thus, public officials are entitled to an adjudication of absolute or qualified immunity "at the earliest possible stage in litigation." *Id.* at 817. By summarily affirming the district court's denial of absolute and qualified immunity, and deferring the adjudication of the Petitioners' defense of qualified immunity until after discovery regarding "good faith," the Ninth Circuit has eviscerated the fundamental purpose of public official immunity. As a result, the Petitioners will suffer the very injury that immunity is supposed to prevent.

THE REASONS FOR GRANTING THIS PETITION

I. Introduction

The Ninth Circuit's summary disposition affirming the district court's denial of absolute immunity is necessarily based upon *Trevino I*, which held that absolute immunity does not apply to punitive damage indemnification votes because such votes are directed at specific individuals rather than society at large. 23 F.3d at 1483. This "individual versus society" approach, however, was rejected by this Court in *Bogan v. Scott-Harris*, which was decided four years *after Trevino I*. 523 U.S. 44.

Despite and *after Bogan*, the Ninth Circuit continues to employ the wrong analysis with respect to absolute immunity:

> "In this circuit, we determine whether an act is legislative by considering two questions: (1) whether the act involves 'ad hoc decisionmaking,

> or the formulation of policy;' and (2) *whether the act applies 'to a few individuals, or to the public at large.'*"

San Pedro Hotel, 159 F.3d at 476 (emphasis added).

The Ninth Circuit likewise improperly continues to inject a subjective element to the qualified immunity analysis, in contravention of *Harlow*, 457 U.S. at 815 (qualified immunity analysis is an *objective* test and the subjective intent of the public officials is irrelevant), and a multitude of subsequent Supreme Court decisions. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806 (1985) (same); *Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S.Ct. 834 (1996) (same). Absent the relief sought here, this misstatement and misuse of the law will also continue unabated.

II. Argument

A. Absolute Immunity

The issue addressed by the Ninth Circuit in *Trevino I* was whether voting to indemnify officers for punitive damages awards constitutes a legislative act (for which absolute immunity would apply), or an administrative or executive act (for which there would be no absolute legislative immunity). This is an issue analyzed and decided wrongly not only in the Ninth Circuit, but by other Circuits as well.

In fact, there is a split among the Circuit Courts of Appeals as to what test should be used for determining whether an act is legislative, on the one hand, or administrative or executive, on the other hand. *Compare Ryan v. Burlington County, New Jersey*, 889 F.2d 1286, 1291 (3rd Cir. 1989) (acts directed at individuals, rather than the

society at large, are executive and not entitled to absolute immunity); *Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988) (same); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989) (same); *Smith v. Lomax*, 45 F.3d 402, 406 (11th Cir. 1995) (same) *with*, *Acierno v. Cloutier*, 40 F.3d 597, 611 (3rd Cir. 1994) (rejecting the individual versus society test); *Carlos v. Santos*, 123 F.3d 61, 66 (2nd Cir. 1997) (whether an act is legislative or executive depends on the legislator's function in connection with that act); *Scott v. Greenville County*, 716 F.2d 1409, 1423 (4th Cir. 1983) (using the functional test to determine applicability of absolute immunity); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (same); *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1251 (10th Cir. 1998) (same).

Trevino I held that the applicable test is to determine whether the action taken applies generally to society or whether it is directed to a few individuals; according to the Ninth Circuit, votes on punitive damage awards are not "legislative" and therefore are not entitled to absolute immunity. *Trevino I*, 23 F.3d at 1482-1483. In so holding, *Trevino I* relied on a First Circuit case, *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984), but this Court's decision in *Bogan* explicitly rejected the reasoning used in *Cutting*. *Compare Bogan*, 523 U.S. at 54-55, *with Trevino I*, 23 F.3d at 1482 (*citing Cutting*, 724 F.2d at 261) and *Scott-Harris v. City of Fall River (Bogan)*, 134 F.3d 427, 440-441 (1st Cir. 1997) (*citing, e.g., Cutting*, 724 F.2d at 261), *reversed*, 523 U.S. 44.

Four years after *Trevino I*, this Court decided *Bogan* and implicitly, if not explicitly, overruled *Trevino I*'s absolute immunity analysis. 523 U.S. at 54. This Court

rejected the "individual versus society" test as overly intrusive into the thinking and motivations of legislators. *Id.* at 55. The Court established that the test for absolute immunity is whether the legislator's actions were integral to the legislative process. *Id.* at 54-55. In *Bogan*, *how* the mayor and the city council acted, not *why* they acted, made the difference. *Id.* at 55. Despite *Bogan*, and six months after *Bogan* was decided, in 1999 in the *San Pedro* decision, the Ninth Circuit continued to misstate and misuse the *Trevino I* analysis. *San Pedro*, 159 F.3d at 476.

In *Bogan*, the city council approved, and the mayor signed, an ordinance which eliminated a local governmental health services department. *Id.* at 47. The plaintiff argued that because that department had only one person in it, the ordinance was one that was directed to an individual, rather than to the society at large, and therefore absolute immunity should not apply. *Id.* at 48. This Court rejected the "individual versus society" test the Ninth Circuit relied on in *Trevino I* and held, instead, that "whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54.

The Court held that the mayor and a city councilmember were entitled to absolute immunity because the acts at issue, namely, proposing and voting on an ordinance, "were integral steps in the legislative process." *Id.* at 55. Moreover, the actions of the government reflected policymaking from the budgetary reasons for eliminating the plaintiff's position to the benefits and harm to society from eliminating the services the plaintiff provided. *Id.* at 47, 55-56. Recognizing the dangers to the governmental process in the event legislators became subject to lawsuits for the exercise of their legislative function, this Court noted that

there are other remedies in the event the public believes there is an improper use of the legislative powers. *Id.* at 52-53.

The absolute immunity test articulated by this Court, therefore, is whether the actions at issue are "integral steps" in the legislative process, a test the Ninth Circuit consistently has failed to apply and has ignored here. The legislative process is plainly invoked here. The Petitioners vote pursuant to a specific state statute (Cal. Gov't Code § 825(b)) authorizing them to make the alleged punitive damage indemnification votes in question here. By definition, that process is legislative. The inquiry should end there.

This Court's reasoning in *Bogan* further protects the process underlying the Petitioners' alleged votes here. The Petitioners act as legislators in deciding when to expend the resources of the County, in deciding if doing so would be in the "best interests of the County" (Cal. Gov't Code § 825(b)(3)), and in deciding when indemnity of an official acting in the "apparent best interests of the public entity" (Cal. Gov't Code § 825(b)(2)) would further the statutory purpose. Those determinations necessarily implicate the public and fiscal policy of the County.

The county's budget on a year-to-year basis is a finite amount; a decision to spend a portion of that budget to indemnify Sheriff's deputies necessarily means that those funds will not be available for another use in the county. Votes to indemnify also invoke public policy issues, *i.e.* "the best interests of the County." As in *Bogan*, these are "quintessentially legislative" functions.

The Ninth Circuit has failed to follow this Court's precedent, opting instead to follow and apply its own test

from *Trevino I*. Other Circuits also have failed to follow *Bogan*, *see, e.g.*, *Bryan v. City of Madison, Mississippi*, 213 F.3d 267, 273 (5th Cir. 2000). Thus, more than the Ninth Circuit's error is at stake here. This important issue needs to be addressed and clarified.

B. Qualified Immunity

In its trio of cases holding that qualified immunity rests on an analysis of the local legislator's "good" or "bad" faith in voting to indemnify punitive damage awards, *see Trevino II*, 99 F.3d at 918, *Cunningham*, 229 F.3d at 1292, and *Navarro*, 250 F.3d 734, the Ninth Circuit improperly injected a *subjective* element into the qualified immunity analysis. Inquiring into the subjective state of mind of an individual legislator tears away at this immunity to suit and threatens to impede the very function of government.

Qualified immunity is designed to protect governmental officials from the threat of litigation which would otherwise: (1) deter talented officials from entering public office; (2) discourage the vigorous exercise of official authority; and (3) distract government officials from performing their duties. *Richardson v. McKnight*, 521 U.S. 399, 407, 117 S.Ct. 2100 (1997) (internal citations and quotes omitted). *See Nevada v. Hicks*, 533 U.S. 353, 400, 121 S.Ct. 2304 (2001) (qualified immunity is designed to short circuit litigation for officials so that they are not subjected to the costs of trial or the burdens of discovery).

In 1982, this Court observed that the then-existing qualified immunity analysis contained two components – an "objective" aspect and a "subjective" one. *Harlow*, 457 U.S. at 815. Under the subjective component, "qualified immunity would be defeated if an official . . . 'took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury. . . .' [internal citations omitted]." *Id.* at 815 (emphasis in original). This subjective inquiry necessarily focused on the legislator's motive, intention and reasoning in taking the act in question, a premise that is "not consonant with our scheme of government." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783 (1951).

In *Harlow*, the Court rejected the subjective element as incompatible with the underlying purpose of qualified immunity. *Id.* at 815-16. The Court stated that because "an official's subjective good faith" is often considered a question of fact for the jury, the subjective element of the analysis makes it nearly impossible to prevent insubstantial claims from proceeding to trial, contrary to the purpose of qualified immunity in the first place. *Id.* at 816. An inquiry into a legislator's subjective intent, the Court reasoned, also requires "broad-ranging discovery" which is "peculiarly disruptive of effective government." *Id.* at 817. The Court in *Harlow* warned that "there is no clear end to the relevant evidence" of the intent of a legislator, including depositions of the legislator's "professional colleagues." *Id.* at 816-17.

These kinds of inquiries are grossly unfair to municipal legislators who would have to undergo depositions and discovery and have to stand trial on what they thought about, and what they were motivated by, when they voted. These inquiries conflict with the separation of powers

between the judicial and legislative branches and would result in undesired judicial inquiry into "why" a legislator enacted the law in question. As discussed in *Harlow*, inquiry into legislators' thought processes would harm the public interest and impair the legislative independence at the core of our representative government.

The Court in *Harlow* recognized and sought to avoid these consequences, by opting for an *objective* qualified immunity standard. The Court's objective test focuses on whether the challenged conduct violates "clearly established law" of which "a reasonable person would have known."[3] *Id.* at 818. The Court thus ensured that qualified immunity would serve the purpose for which it was designed – to protect public officials, and society as a whole, from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. *See Anderson*, 483 U.S. at 638 (qualified immunity protects government officials from "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); *Mitchell*, 472 U.S. at 526 (same); *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584 (1998) (same).

[3] This decision brought the qualified immunity analysis in line with that of absolute immunity, which forbids consideration of the defendant official's subjective motivation. *See Tenney*, 341 U.S. at 377.

Affirming the lower court's decision here, the Ninth Circuit relied on its decision in *Navarro*, 250 F.3d at 733-734, which upheld the denial of a Rule 12(b)(6) motion to dismiss and held that discovery was permissible to inquire into the "good" or "bad" faith of municipal legislators. Thus, in *Navarro*, which was decided eight days after briefing in this case was completed, and in the instant case, the Ninth Circuit used a subjective rather than an objective test in deciding the issue of qualified immunity.

Navarro and the Court of Appeals' decision here require that district courts look into the minds of the Petitioners and not only determine what they were thinking at the time they made each alleged indemnification vote, but whether they voted with malice (i.e. "bad" faith). This inquiry requires legislators, once plaintiff pleads the appropriate "state of mind," to come forward with evidence to prove that they voted in "good faith," thus nullifying the protective purpose of qualified immunity. This analysis is the reincarnation of the subjective component rejected by this Court in *Harlow*. *See* 457 U.S. at 815-16.

The Ninth Circuit's continued use of a subjective standard contravenes nearly twenty years of this Court's jurisprudence: *Harlow*, 457 U.S. at 815 (qualified immunity analysis is based upon an objective analysis of the public officials' conduct); *Anderson*, 483 U.S. at 639 (applicability of qualified immunity "turns on the 'objective legal reasonableness' of the action"); *Behrens*, 516 U.S. at 306 (*Harlow* adopted an "objective legal reasonableness" test for qualified immunity, and in the process rejected a subjective "good faith" one); *Crawford-El*, 523 U.S. at 588 (defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the

defendant's subjective intent is simply irrelevant to that defense).

CONCLUSION

This Court often has emphasized the importance of absolute and qualified immunity to the efficient and effective operation of government and has articulated standards by which those doctrines are to be applied. The Ninth Circuit, however, has ignored the reasoning of these cases and, instead, has permitted lawsuits against local legislators involving expensive, time-consuming and distracting litigation and discovery.

It is vitally important that this Court reverse the aberrant decisions of the Ninth Circuit. For all the foregoing reasons, Petitioners respectfully pray that this Court grant the instant petition for *writ of certiorari* to prevent the erosion of these immunity doctrines. Petitioners further respectfully request such other and further relief as this Court deems just and proper.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER ROCHA,

Plaintiff-Appellee,

v.

MICHAEL ANTONOVICH; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; LEE BACA; ZEV YAROSLAVSKY,

Defendants-Appellants,

and

PETE SCHABARUM; et al.,

Defendants.

No. 00-57059

D.C. No. CV-00-04989-AHM
Central California

ORDER

(Filed May 15, 2002)

Before: FERNANDEZ, WARDLAW, and W. FLETCHER, Circuit Judges

Because the questions raised in this appeal are so insubstantial as not to require further argument, *see United States v. Hooton,* 693 F.2d 857 (9th Cir. 1982) (per curiam), we grant appellee's motion for summary affirmance, *see Brewster v. Shasta County,* 275 F.3d 803 (9th Cir. 2001); *Navarro v. Block,* 250 F.3d 729 (9th Cir. 2001).

Accordingly, we summarily affirm the district court's judgment.

All pending motions are denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAVIER ROCHA, Plaintiff, v. LEE BACA, *et al.*, Defendant.	CASE NO. CV 00-4989 AHM (BQRx) ORDER DENYING MOTION TO DISMISS CLAIMS AGAINST SHERIFF LEROY BACA AND COUNTY OF LOS ANGELES; GRANTING IN PART AND DENYING IN PART DEFENDANT SUPERVISORS' MOTION TO DISMISS (Filed Nov. 14, 2000)

INTRODUCTION

This case is before the Court on the Motions to Dismiss Plaintiff Javier Rocha's ("Plaintiff") Complaint ("Motions") brought by Defendants Baca, the County of Los Angeles and the Los Angeles County Board of Supervisors. The Complaint alleges claims under 42 U.S.C. § 1983 ("§ 1983") arising out of an incident involving the use of force by deputy sheriffs against Plaintiff at the Los Angeles County Jail Pitchess Detention Center. The constitutional provisions allegedly violated are those in the Fourth, Eighth and Fourteenth Amendments. Plaintiff also alleges state-based tort claims for negligence, battery and infliction of emotional distress. The named defendants include the Los Angeles County Sheriff Leroy Baca, all five members of the Los Angeles County Board of Supervisors ("Supervisors"), the County of Los Angeles, "twenty unknown named defendants," and Deputy Sheriff David

Sameyah,[1] one of the individual deputies who allegedly used force on Plaintiff.

Defendants Baca and Los Angeles County move to dismiss on the ground that Baca is a state agent with Eleventh Amendment immunity to this suit. Baca additionally moves to dismiss on the ground that he is not liable in his individual capacity (collectively "Baca's Mot.").

The Supervisors move to dismiss the Complaint on the grounds that they enjoy either absolute or qualified immunity to this suit and that they are not liable in their individual capacities (collectively "Supervisors' Mot.").

The Court concludes that (1) Baca and Los Angeles County are not immune from suit under the Eleventh Amendment, (2) Plaintiff stated a claim against Baca in his individual capacity, (3) the Supervisors enjoy no absolute immunity, and their qualified immunity does not entitle them to dismissal at this time and (4) the Supervisors may be sued in their individual capacities on a narrow basis only and, to the extent the Complaint could be construed as suing them in their official or supervisory capacities, those claims are dismissed. Accordingly, Defendants' Motions are GRANTED in part and DENIED in part.

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[1] Although he is represented by the same law firm that represents all the defendants, defendant Sameyah answered the Complaint, rather than filing a motion to dismiss.

FACTS AND ALLEGATIONS

"On or about March 17, 1999, at the Los Angeles County Jail Pitches [sic] Detention Center in Saugus, California, Los Angeles County deputy sheriff David Sameyah and 10 unknown LACSD deputy sheriffs used excessive, unreasonable force on the plaintiff, and seriously injured plaintiff." Compl. ¶ 10.

Plaintiff alleges that (1) Los Angeles County is liable under a *Monell* theory; (2) Baca is individually liable under *Monell* because he "knowingly . . . condoned, . . . ratified, [and] took no action to correct . . . the occurrence of the categories of wrongs set forth in this pleading, and/or . . . with reckless disregard to constitutional or other federal rights, failed properly to train, to supervise, . . . or to take corrective action," see Compl. ¶ 9:4-15, and failed to investigate and/or discipline prior incidents of police misconduct, see *Id.* ¶ 9:1-5; and (3) the Supervisors are liable under *Monell* for the foregoing acts and omissions solely because of their "prior decisions to pay for . . . punitive damages assessed by juries against the LACSD deputy sheriffs," see *id.* ¶ 9:8-15.

DISCUSSION

I. Legal Standards For a Motion to Dismiss Pursuant to F. R. Civ. P. 12(b)(6)

On a motion to dismiss pursuant to F. R. Civ. P. 12(b)(6) for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit Partnership v. Turner Broadcasting System, Inc.,* 135 F.3d 658, 661 (9th Cir. 1998). "[A] complaint should not be dismissed unless it appears beyond doubt

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen,* 80 F.3d 1293, 1296 (9th Cir. 1996).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994) *(citing Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 879 n.3 (1st Cir. 1991)).

II. Eleventh Amendment Immunity of the Los Angeles County Sheriff

Defendants Leroy Baca and Los Angeles County argue that because the "Sheriff and all Sheriff's Department officials acts [sic] as state officials in operating the jails . . . . [t]hey are immune from suit[ ] for the claims plaintiffs assert against the public entities and for all actions they take in their official capacities." Baca's Mot. at 2. A state official sued for damages in his official capacity is not a "person" subject to suit within the meaning of § 1983. *Will*

v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Defendants' argument relies on a California Court of Appeal decision holding that:

> [I]n setting policies concerning release of persons from the Los Angeles County Jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles. The county's demurrer to plaintiffs third cause of action alleging liability of the county under section 1983 should have been sustained.

County of Los Angeles v. Superior Court (Peters), 80 Cal. Rptr. 2d 860, 868 (1998). Defendants further argue that this Court is bound by the California court's "interpretation of California law." Baca's Mot. at 4.

As Judge Lawrence Karlton has noted, "whether California county sheriffs, when investigating crimes, are county or state officials under California law is unsettled." *Brewster v. County of Shasta,* 112 F. Supp. 2d 1185, 1190 (E.D. Cal. Sept. 2, 2000) (certifying the question for interlocutory appeal). Even assuming that under California judicial precedent the Sheriff is a state officer, this Court would not necessarily be bound by that determination. State law is relevant to, but not necessarily determinative of, whether government officials are policymakers for the state or the county for purposes of § 1983 liability.

> [O]ur inquiry is dependent on an analysis of state law . . . . This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be

> dependent on the definition of the official's functions under relevant state law.

McMillian v. Monroe County, 520 U.S. 781, 786 (1997) (internal citations omitted) (finding that the balance of the evidence indicates Alabama sheriffs represent the State of Alabama "when executing their law enforcement duties"). The California Court of Appeal can therefore help elucidate the Los Angeles County Sheriff's functions, but its conclusion "simply labeling [him] a state official" does not bind this Court. Absent clear Ninth Circuit authority to the contrary, other district courts have reached the same conclusion, either explicitly or by implication. *See, e.g., Von Colln v. County of Ventura,* 189 F.R.D. 583, 601 (C.D. Cal. 1999) (concluding the *Peters* case "is not controlling here" and "an analysis of California law shows that the sheriff acts as a county policymaker in his operation of the jails"); *Brewster,* 112 F. Supp.2d at 1191 (concluding the "holding in *Thompson* [*v. City of Los Angeles,* 885 F.2d 1439, 1444 (9th Cir. 1989], that sheriffs at least when acting as jail administrators, act as county officials" is binding on district courts until it is overruled),[2] *Leon v. County of San Diego,* 115 F. Supp.2d 1197, __, 2000 WL 1476330, at *5 (S.D. Cal. Sept. 9, 2000) (finding that the sheriff "acts on behalf of the county, not the state, when operating the [county jail] and making policy concerning the treatment of inmates . . . "); *Hawkins v. Baca,* No. CV 00-1078 DDP (CWx) (C.D. Cal. filed June 21, 2000) (holding that "for

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[2] In *Thompson* the Ninth Circuit did not actually hold that with respect to the detention of arrestees the Sheriff functions as a county officer, but it did appear to proceed from that premise, although its language is ambiguous.

purposes of § 1983 liability, Sheriff Baca is a county official rather than a state agent with respect to his operations of the county jail"); *Roe v. County of Lake,* 107 F. Supp. 2d 1146, 1153 (N.D. Cal. 2000) (holding that "[b]ecause a determination of the sheriff's section 1983 liability is a question of federal, not state law, . . . to the extent that *Peters* invites a ruling that Sheriff Mitchell is a state actor, I decline the invitation"). In fact, this Court has found only one published federal case holding that a California sheriff is a state agent immune from § 1983 liability when "acting as a jailer." *Smith v. County of San Mateo,* 1999 WL 672318, at *8 (N.D. Cal. Aug. 20, 1999).

In *McMillian,* the Supreme Court concluded that under Alabama state law, an Alabama sheriff is a state official when executing his "law enforcement" duties. However, as shown above at least six federal courts have found that a sheriff in California is a county rather than a state official. Of these courts, five so concluded after taking into account both the *McMillian* and *Peters* decisions in their analysis of the various California statutory and constitutional provisions that relate to California county sheriffs. (In those statutes and constitutional provisions support for either conclusion can be found.) Most relevant here, at least four courts concluded that a California sheriff is a county official for purposes of overseeing jail operations. Only one court appears to have concluded otherwise. Although the courts all extensively analyzed and persuasively interpreted the relevant state laws, this Court is persuaded by the weight and the reasoning of those authorities in the majority finding that a sheriff in California is a county official. Furthermore, this Court agrees with the *Brewster* court that district courts in this circuit are still bound by the *Thompson*

decision notwithstanding *Peters*. *See* 112 F. Supp. 2d at 1191. The Court therefore holds that with respect to the operations of the county jail, the Los Angeles County Sheriff is not a state agent and he may be sued under § 1983.

The motions of defendants Baca and Los Angeles County to dismiss on Eleventh Amendment grounds are DENIED.

III. Respondeat Superior Liability and Supervisory Liability of Baca

Defendant Baca argues that he is not liable under a theory of respondeat superior. Baca's Mot. at 5. That is correct and Plaintiff does not claim otherwise; he disclaims a theory of respondeat superior liability against Baca. Opp. to Baca's Mot. at 19 n.1. In fact, Baca's argument suggests that he actually challenges the allegations that he is subject to supervisory liability. *Id.; see also* Compl. ¶ 9:14-27 (individual liability premised upon failure to train, supervise, monitor and take corrective action is consistent with a theory of supervisory liability).

Baca may be held liable in his individual capacity on a theory of supervisory liability for his "own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivations[;] . . . or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir. 1991) (internal citations and quotation marks omitted). Plaintiff here alleges that Baca is liable because he "knowingly . . . condoned . . . . ratified, [and] took no action to correct . . . the occurrence of the categories of wrongs set forth in this

pleading, and/or . . . with reckless disregard to constitutional or other federal rights, failed properly to train, to supervise, . . . or to take corrective action . . . . " Compl. ¶ 9:4-15. Such allegations clearly are intended to paraphrase the various standards for individual supervisory liability in *Larez* and they sufficiently state a claim against Baca in his individual capacity at this stage of the proceedings. The court notes, however, that it is all-too-easy for an attorney to use boilerplate language in alleging such a claim; whether there are facts to support the claim is another matter, to be addressed later.

Defendant Baca's motion to dismiss the claim for individual supervisory liability is therefore DENIED.[3]

IV. Liability of the County Supervisors

A. Absolute Immunity

The Supervisors argue that they cannot be liable based on their past votes to indemnify deputies against punitive damage awards because they are entitled to absolute legislative immunity for such votes. Supervisors' Mot. at 4. Confronted with clear Ninth Circuit precedent denying absolute legislative immunity for decisions whether to pay punitive damage awards, see *Trevino v.*

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[3] In reluctantly reaching this conclusion, the Court notes that Baca has been sued on this theory in other actions. If after discovery, trial or otherwise there is a finding that in fact he has not failed to train, supervise and take corrective action against miscreant deputies assigned to the jail, and has not condoned or ratified their misconduct, then future complaints alleging these boilerplate-type claims, or lawsuits that continue to prosecute them, might be subject to sanctions under Fed. R. Civ. P. 11, 28 U.S.C. § 1927 or otherwise.

Gates (Trevino I), 23 F.3d 1480, 1482 (9th Cir. 1994), the Supervisors argue that the "decision in *Trevino I* is in direct conflict with, and otherwise does not withstand the expanded rule that, local legislators are entitled to absolute immunity as defined by the Supreme Court in *Bogan* [*v. Scott-Harris,* 523 U.S. 44 (1998)]." Supervisors' Reply at 6.

The Supervisors previously advanced this same argument in this District and were unsuccessful:

> Although it is clear that the *Bogan* decision expanded absolute immunity to local legislators, the Court is not convinced that it meaningfully expanded the concept of absolute immunity in general. As has always been the case, absolute immunity depends on whether the legislator in question is acting in a legislative capacity. *Bogan* merely clarified that, in determining whether particular acts are legislature, the actors' subjective intent and motives should not be considered. This Court does not believe that *Bogan* overruled *Trevino I.* In *Trevino I,* the Ninth Circuit held that the act of deciding whether to indemnify police officers for punitive damage awards is not a legislative act because it does not involve the formulation of policy and is not directed to the public as a whole. Unlike the act in *Bogan,* which involved the quintessentially legislative act of voting on a city budget, the act in *Trevino I* involved voting on whether to indemnify a specific individual in a specific case. The Court thus finds that the ultimate holding in *Trevino I* is still the law in this circuit, and that, based on this clear Ninth Circuit authority, the Supervisors are not entitled to absolute immunity.

Hawkins v. Baca (Hawkins II), 114 F. Supp. 2d 987, 991 (C.D. Cal. Sept. 22, 2000). This Court's conclusion is the same, *i.e.,* the *Bogan* decision does not overrule the clear Ninth Circuit precedent in the *Trevino* decisions.

The Supervisors' motion to dismiss on the ground of absolute immunity is DENIED.

B. Qualified Immunity

The Supervisors also argue that they are entitled to qualified immunity. Supervisor's Mot. at 7. They rely heavily on *Hernandez v.. Gates,* 100 F. Supp. 2d 1209 (C.D. Cal. 2000), in which the District Court held that members of the Los Angeles City Council have qualified immunity entitling them to dismissal under Fed. R. Civ. P.12(b)(6). That decision relied on *Trevino v. Gates (Trevino II),* 99 F.3d 911, 918 (9th Cir. 1996). In *Trevino II* the Ninth Circuit examined whether city council members could be liable under § 1983 for voting to indemnify police officers against punitive damage awards in excessive force cases. Officials sued under § 1983 are entitled to qualified immunity if: "(1) the 'right' they allegedly violated was not 'clearly established' at the time of the violation, or (2) if a reasonable [official] would have thought that the defendants' actions were constitutional." *Id.* at 916. The *Trevino II* court found that as of the time that the council members voted to indemnify the officers "the law [was] not clearly established that a policy of indemnifying punitive damage awards violates constitutional rights." *Id.* at 918. It also observed that: "A city council does not violate section 1983 if it indemnifies officers against punitive damage awards on a discretionary, case by case basis, and complies in good faith with the requirements of Cal. Gov. Code § 825(b)."

Id.[4] In *Trevino II* the District Court had found on a *summary judgment* motion that the plaintiff had failed to demonstrate a clearly established right. Having upheld the grant of summary judgment on that basis, the Ninth Circuit did not address the second prong (i.e., whether the legislators had acted in good faith). *Id.*

Trevino II was decided more than four years ago. Very recently the Ninth Circuit clarified the interplay between the requirement of good faith and qualified immunity. In reversing a District Court's denial of summary judgment sought by members of the Los Angeles City Council, the Ninth Circuit stated:

> In order to defeat the council members' motion for summary judgment [the plaintiff] must present some evidence that the council members did not implement section 825's indemnification procedure in good faith . . .

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[4] Cal. Gov. Code § 825(b) reads in relevant part:

> . . . [A] public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:
>
> (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
>
> (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
>
> (3) Payment of the claim or judgment would be in the best interests of the public entity.

Cunningham v. Gates, 2000 WL 1617016 at *16 (9th Cir. Oct. 31, 2000). The Ninth Circuit then went on to overrule the District Court's denial of summary judgment:

> The council members' evidence suggests that they implemented section 825's indemnification procedure in good faith in accordance with *Trevino.* Indeed, rather than following a policy of rubber-stamping City Attorney recommendations, the undisputed evidence shows that the council members considered each claim on a case-by-case basis. [The plaintiff]'s conclusory allegations cannot withstand the council members' motion for summary judgment [on qualified immunity grounds].

Id.

Here, this Court anticipates that if plaintiff fails to come up with evidence of bad faith (or evidence of a lack of good faith) on the part of the supervisors, that will be sufficient to entitle them to summary judgment. Similarly, affirmative proof by the supervisors of their good faith would entitle them to summary judgment, as was the case in *Cunningham v. Gates.* But this is a motion to dismiss, and Plaintiff alleges that the Supervisors' prior decisions to indemnify deputies for punitive damage awards were made "knowingly, or grossly negligently, or with deliberate indifference to the rights allegedly violated, [and they] caused to come into being, maintained, fostered, condoned, approved of, either before or after the fact, ratified, took no action to correct, an official policy, practice, procedure, or custom of permitting the occurrence of the categories of wrongs set forth in this pleading, and/or [were made] improperly, inadequately, with deliberate indifference to the constitutional or other federal rights of persons . . ."

Compl. ¶ 9:2-12. True, these too are boilerplate claims, and this Court intends to assess very carefully whether there is evidence to support them; but read in the light most favorable to Plaintiff, these allegations sufficiently plead bad faith to survive a motion to dismiss. *See Hawkins II*, 114 F. Supp. 2d at 992 (holding that the plaintiff sufficiently pled bad faith by alleging that the Supervisors "have a policy of 'routinely rubber-stamping indemnification payments of punitive damages assessed against deputy sheriffs' ").[5]

The Supervisors' motion to dismiss on the ground of qualified immunity is DENIED.[6]

C. Causation

In their Reply, the Supervisors for the first time briefed the argument that Plaintiff failed to allege facts sufficient to show causation. Supervisor's Reply at 9. The Court will not dismiss a complaint based on a theory that Plaintiff did not have an adequate opportunity to oppose,

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[5] In reluctantly reaching this conclusion, this Court is troubled by the prospect that a plaintiff who survives a motion to dismiss (which is not difficult to do) will then be in a position to conduct discovery that, if abused or unnecessarily extensive, could seriously interfere with the duties of elected officials. Perhaps counsel for such "local" legislative bodies as city councils or boards of supervisors can explore means, *e.g.*, the preparation of transcripts, that would reflect the manner in which the decision-making process was carried out and thereby preclude the need for serial depositions.

[6] Although in a very considered opinion, *Hernandez v. Gates*, *supra*. reached the opposite conclusion and result, this Court notes that *Hernandez* does not take into account that the standards on a 12(b)(6) motion differ from those in a summary judgment motion.

but it is nevertheless worth noting that the Supervisors concede that "the issue of causation is a question for the trier of fact, . . . [unless] there is no genuine issue of material fact." *Id.* The Supervisors' own characterization makes it clear that while summary judgment may be appropriate if there is no *evidence* supporting causation, a determination at this stage would be premature. *See, e.g., Arnold v. International Bus. Machines Corp.*, 637 F.2d 1350, 1356, (9th Cir. 1981) ("If [the plaintiff] could point to any fact that would tend to show that defendants had some control or power over the [actors], and that defendants directed the [actors] to take action against [the plaintiff], there would certainly be a dispute of material fact on the issue of proximate cause [under § 1983] sufficient to reverse the summary judgment."). The Supervisors have not cited a single case resolving § 1983 causation issues on a motion to dismiss. Their motion to dismiss on the ground of causation is DENIED.

D. Liability in Their Individual Capacities

Plaintiff's Complaint is internally contradictory as to whether the Supervisors are sued in their official or individual capacities, or both. Compare Compl. ¶ 5 ("Each . . . defendant is sued in [both capacities]") with ¶ 9, p4:23-27 ("All Monell defendants, *except* the County Supervisors, are sued on this [Monell] theory both in their individual/personal capacities as well as in their official capacities.") The Supervisors argue that they "cannot be held personally liable under Section 1983 for the constitutional deprivations caused by subordinates, absent [their] participation or direction in the deprivation." Supervisors' Mot. at 10. Plaintiff's only response is that the Supervisors "also are liable in their official capacities." Opp. to

Supervisors' Mot. at 5. Based on Plaintiff's opposition memo and his counsel's argument at the hearing, the Court concludes that Plaintiff has sued the Supervisors in both their official and their individual capacities, but not on a *respondeat superior* basis. Instead of wasting time with a new round of pleadings that would only cure possible linguistic ambiguities, the Court will construe the complaint to allege that the Supervisors are liable (a) in their official capacities for promoting and maintaining (etc.) an unconstitutional policy and practice concerning indemnification and (b) in their individual capacities for having carried out that policy in a manner that allegedly caused harm to Plaintiff.

As to liability in their official capacities under construction (a), above, the Court notes that such claims would be duplicative because the County of Los Angeles is also a defendant. "There is no longer a need to bring official- capacity actions against local government officials, for under *Monell, supra,* local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985). The Supervisors therefore need not be named separately in their official capacities and claims against them in that capacity are hereby DISMISSED as duplicative.

Plaintiff may conduct discovery and otherwise continue to litigate his claims only under construction (b), above; Plaintiff may not seek recovery or other relief on any theory that the Supervisors are liable because of what they allegedly did in their official capacities or because of what deputy sheriffs allegedly did as the supposed subordinates of the Supervisors.

The Supervisors' motion to dismiss the claims against them in their individual capacities is therefore GRANTED in part and DENIED in part.

V. Local Rule 7.4.1

Plaintiff also argues that the motion papers should not be considered because Defendants failed to comply in good faith with Local Rule 7.4.1. Plaintiff is wrong. Defense counsel requested a 7.4.1 meeting on September 15, 2000. Plaintiff responded by demanding that defense counsel "cite to us any authorities you may have to support the contentions in your letter, so that we may review them before we meet with you . . . " There is no such precondition to a Local Rule 7.4.1 meeting and the Court therefore finds that Defendants attempted in good faith to meet and confer prior to filing these Motions.

CONCLUSION

For all the foregoing reasons, Defendants' Motion is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

DATE: November 14, 2000

/s/ A. Howard Matz
A. Howard Matz
United States
District Judge

Article 4

INDEMNIFICATION OF PUBLIC EMPLOYEES

§ 825. Defense by public entity; payments of judgments, compromises or settlements; punitive damages; memorandum of understanding; elected officials; tortious influencing of judicial actions

* * *

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity, other than the state as defined in Section 900.6, is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

* * *

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAVIER ROCHA Plaintiff, v. LEE BACA, YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, PETE SCHABARUM, DEANE DANA, MICHAEL ANTONOVICH, DAVID SAMEYAH, TWENTY UNKNOWN NAMED DEFENDANTS, all sued in their individual and official capacities, and COUNTY OF LOS ANGELES, sued only in its official capacity, Defendants.	No. CV- **COMPLAINT** (Damages for deprivation of civil rights; pendant state tort claims) **JURY DEMAND**

JURISDICTION AND VENUE

1. The claims made herein are asserted pursuant to the United States Constitution, and 42 U.S.C. 1983, *et seq.*, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331 and 1343. The state law claims made herein are made based on California law, and with respect

to those claims, jurisdiction is based on the supplemental jurisdiction of the Court.

2. The acts and/or omissions complained of occurred in the Central District of California, and, therefore, venue lies in this District pursuant to 28 U.S.C. 1391.

THE PARTIES

3. The plaintiff Javier Rocha was an inhabitant of and within the jurisdiction of the United States of America at all times herein alleged, and was and is a citizen of the United States of America. Plaintiff continuously has been imprisoned and under a sentence of penal custody for a term of less than life since the date of the underlying incident. March 17, 1999, on which the plaintiff's claims against defendants are based, therefore, the statute of limitations on plaintiff's claims is tolled for the period of his confinement pursuant to Cal. Code Civ. Proc. Sec. 352, and has not yet begun to run.

4. Defendant County of Los Angeles is a California County; defendants Antonovich, Burke, Dana, Knabe, Molina, Yaroslavsky, all were or are Los Angeles County Supervisors ("County Supervisors"); Lee Baca, at all relevant times herein, was and is a California police officer and legal head and policymaker for the County of Los Angeles Sheriff's Department ("LACSD"); defendant David Sameyah was and is a Los Angeles County Sheriff's Department ("LACSD") deputy sheriff, and Unknown Named defendants Nos. 1-20 are Los Angeles County ("LAC") employees and/or LACSD deputy sheriffs who may be responsible for the conduct alleged hereinbelow.

5. Each and every defendant who is a natural person is sued in both his/her individual/personal capacity, as well as in his/her official capacity if he/she had any policymaking duties, functions, or responsibilities with respect to the matters alleged herein.

FACTS COMMON TO ALL COUNTS

6. Each and every allegation set forth in each and every averment of this pleading hereby is incorporated by this reference in each and every other averment and allegation of this pleading.

7. The plaintiff was deprived of an interest protected by the Constitution and/or laws of the United States of America, and each and every defendant caused, by commission or omission, such deprivation while acting under color of state law.

8. All acts and/or omissions perpetrated by each defendant, except the governmental entity or any defendant only in his/her official capacity, were engaged in maliciously, callously, oppressively, wantonly, recklessly; with deliberate indifference to the rights allegedly violated, despicably, and with evil motive and/or intent, in disregard of the rights of the plaintiff.

9. Any governmental entity defendant, and any defendant in his/her official capacity knowingly, or grossly negligently, or with deliberate indifference to the rights allegedly violated, caused to come into being, maintained, fostered, condoned, approved of, either before the fact or after the fact, ratified, took no action to correct, an official policy, practice, procedure, or custom of permitting the occurrence of the categories of wrongs set forth in this

pleading, and/or improperly, inadequately, with deliberate indifference to the constitutional or other federal rights of persons, grossly negligently, with reckless disregard to constitutional or other federal rights, failed properly to train, to supervise, to retrain, if necessary, to monitor, or to take corrective action with respect to the police and with respect to the types of wrongful conduct alleged in this pleading, so that each one of them is legally responsible for all of the injuries and/or damages sustained by the plaintiff pursuant to the principles set forth in *Monell v. New York City Dept. of Social Services*, and its progeny.

All *Monell* defendants, except the County Supervisor defendants, are sued on this theory both in their individual/personal capacities as well as in their official capacities.

Also, it is alleged that prior failures to investigate police misconduct and/or to discipline police found culpable for misconduct, inadequate investigations into and/or inadequate discipline imposed for police misconduct, and/or a failure to investigate or to discipline the police defendants in this case, all make the *Monell* defendants, except the County Supervisor defendants, liable for the police misconduct in this case.

Also, it is alleged that prior decisions to pay for, or to indemnify for, or to hold harmless for, or to bond for punitive damages assessed by juries against the LACSD deputy sheriffs is a basis for liability in this case, as it constitutes conduct that falls within the definitions of the first sentence of this averment, and defendants Los Angeles County Supervisors are liable for all conduct alleged herein only on this basis.

10. On or about March 17, 1999, at the Los Angeles County Jail Pitches [sic] Detention Center in Saugus, California, Los Angeles County deputy sheriff David Sameyah and 10 unknown LACSD deputy sheriffs used excessive, unreasonable force on the plaintiff, and seriously injured plaintiff.

COUNT ONE

11. At the time of the incident alleged in this case, set forth at averment 10, immediately above, the rights of persons within the jurisdiction of the United States of America under Amendment IV to the United States Constitution to be secure in home, person, papers, and effects against unreasonable searches and/or seizures, and not to be subjected to the use of unreasonable or excessive force were in effect, and any individual police officer defendant engaged in conduct (including actionable omissions, if applicable), as set forth in averment 10, immediately above, violated those Fourth Amendment rights, and thereby also violated the Fourteenth Amendment to the United States Constitution, and by virtue thereof, each such police officer is liable to the plaintiff for damages, either nominal or compensatory, according to proof.

COUNT TWO

12. At the time of the incident or incidents alleged in this case, set forth hereinabove in averment 10, the rights of persons within the jurisdiction of the United States of America under the Fourteenth Amendment to the United States Constitution not to suffer a deprivation of due process or of equal protection of the laws, and to be free

from cruel and unusual punishment, were in effect, and any individual police officer defendant engaged in conduct, as set forth hereinabove in averment 10, caused a violation of those rights, and by virtue thereof, each such police officer is liable to the plaintiff for damages, either nominal or compensatory, according to proof.

COUNT THREE

13. At the time of the incident or incidents alleged in this case, set forth hereinabove in averment 10, the right of persons within the jurisdiction of the United States of America under Amendment VIII to the United States Constitution to be free from cruel and unusual punishment were in effect, and any individual police officer engaged in conduct, as set forth hereinabove in averment 10, that violated that Eighth Amendment right, thereby violated the Fourteenth Amendment to the United States Constitution, and by virtue thereof, each such police officer is liable to plaintiff for damages, either nominal or compensatory, according to proof.

COUNT FOUR

14. Also, it is alleged that, if there is more than one police officer defendant in this action, there was an agreement or understanding between or among such police to engage in the conduct alleged herein to be wrongful, and that there was the commission of an overt act in furtherance of said conspiracy.

STATE TORT CLAIMS

COUNT FIVE

(NEGLIGENCE)

15. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 16-24 of this Complaint.

16. Plaintiff timely filed a tort claim with the County of Los Angeles within six months from the date of the incident, and on January 14, 2000, said tort claim was denied by the County of Los Angeles. A copy of the tort claim and denial of said claim by the County of Los Angeles Board of Supervisors is attached hereto as Exhibits 1 and 2 respectively, and incorporated herein by this reference.

17. Plaintiff alleges that defendants County of Los Angeles, Baca, defendant Sameyah, and 10 unknown named LACSD deputy sheriff defendants, owed him a duty of care, and that defendant unknown named Sameyah, and the 10 unknown named LACSD deputy sheriffs, and each of them, negligently, carelessly, and in reckless disregard for plaintiff's safety, breached that duty of care by negligently and carelessly using excessive, unreasonable force on plaintiff, thereby seriously injuring plaintiff.

18. Plaintiff further alleges that defendant Baca and the County of Los Angeles negligently hired and retained defendant Sameyah, and the 10 unknown named LACSD deputy sheriffs, who negligently, carelessly, and in reckless disregard for plaintiff's safety injured and battered plaintiff, even though defendant Baca and the County of Los Angeles knew or should have known that defendant

Sameyah and the 10 unknown named deputy sheriffs and each of them had a propensity for using excessive force and battering and injuring Jail inmates, and that said deputy sheriffs had violent propensities and were unfit for duty. Plaintiff alleges that all defendants' breach of their duty was a direct and legal cause of plaintiffs' damages.

COUNT SIX

(BATTERY)

19. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 15-24 of this Complaint.

20. Plaintiff asserts a claim of battery against defendant Sameyah, and 10 LACSD unknown named deputy sheriffs, based upon the unlawful touching of plaintiff by defendant Sameyah, and 10 LACSD unknown named deputy sheriffs, and each of them, which caused plaintiff to suffer injury, damages, loss and harm.

COUNT SEVEN

(NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

21. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 15-24 of this Complaint.

22. Plaintiff asserts a claim for the negligent and intentional infliction of emotional distress against defendant Sameyah, and 10 LACSD unknown named deputy sheriffs, and each of them, for engaging in outrageous conduct intended to cause plaintiff to suffer emotional

distress, or with reckless disregard of the probability of causing plaintiff to suffer emotional distress, or by negligently causing plaintiff to suffer serious emotional distress, and plaintiff suffered severe emotional distress which was caused by the outrageous conduct of said defendants.

COUNT EIGHT

(RESPONDEAT SUPERIOR)

23. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 15-24 of this Complaint.

24. Defendant Sameyah, and the 10 unknown named LACSD deputy sheriffs were employees of defendant County of Los Angeles, and were acting in the course and scope of their employment when they engaged in the wrongful conduct, namely, the negligently causing injury to plaintiff, battering plaintiff, and their intentional and negligent infliction of emotional distress which caused plaintiff to suffer injury, damages, loss and harm.

WHEREFORE, the plaintiff requests damages, as follows, according to proof, against each defendant:

1. Nominal or general damages;

2. Punitive damages;

3. Interest from the date of the wrongful conduct;

4. Costs of suit, including attorneys' fees; and,

5. Such other relief as may be warranted or is just and proper.

DEMAND FOR JURY

Trial by jury of all issues is demanded.

YAGMAN & YAGMAN
& REICHMANN

By: /s/ _____
MARION R. YAGMAN